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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-245

No. ~~1789~~

NICHOLAS PICCHIONE ET AL.,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

COMMISSIONER OF INTERNAL REVENUE
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on March 12, 1971.

Opinions Below

The opinion of the United States Tax Court is printed in Appendix A hereto (p. 37, below) and is officially reported at 54 T.C. (No. 141) 1490. The decision of the Tax Court is printed in Appendix B hereto (p. 43).

The opinion of the Court of Appeals for the First Circuit is printed in Appendix C hereto (p. 44, below) and

although not yet officially reported is unofficially reported by Commerce Clearing House at 71-1 U.S.T.C. Par. 9268, and by Prentice-Hall at 27 A.F.T.R. 2d 71-885.

Jurisdiction

The judgment of the Court of Appeals was entered on March 12, 1971, and is set forth in Appendix D hereto (p. 50, below). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the exclusion of a copyright interest from the definition of a "capital asset", effected by the Revenue Act of 1950, was intended by Congress to operate retrospectively so as to change the tax nature of a copyright sold in a completed sale consummated more than four years earlier in 1946?

2. If the preceding question be answered affirmatively, whether this statutory change violates the due process clause of the Fifth Amendment as unreasonably retroactive legislation?

Constitutional and Statutory Provisions Involved

The pertinent constitutional and statutory provisions involved, namely, U.S. Const. Amend. V, (1 U.S.C.); Section 117(a) of the Internal Revenue Code (26 U.S.C.) of 1939 (as amended by the Revenue Act of 1950, Sec. 210(a) and (c), 64 Stat. 906, 932, 933); and Sections 652, 662, 1221, and 7851(a) of the Internal Revenue Code (26 U.S.C.) of 1954, are set forth in Appendix E hereof (p. 51, below).

Statement

The facts were all stipulated.

Petitioners Nicholas and Lillian B. Picchione are husband and wife, residents of Rhode Island.

Nicholas Picchione is a Certified Public Accountant who before 1945 originated a record book entitled "Dome Simplified Weekly Bookkeeping Record".

Before January 1, 1945, he transferred his entire interest therein to his wife, Lillian, and his son, Everett. During 1945 Lillian and Everett obtained a copyright in their own names. On January 2, 1946, they sold their entire interest in the book to a corporation[1] in return for monthly payments equal to 20% of the gross selling price of books sold by the corporation through October 1, 1973.

At the time of this sale in 1946, neither Lillian nor Everett (nor Nicholas) was engaged in the business of originating literary materials.

In 1952 Lillian and Everett transferred to a trust their right to any future payments from their 1946 copyright sale. The trustee was directed to accumulate trust income until he had $50,000. When the trust had accumulated $50,000, the trustee was directed thereafter to pay the annual trust net income to Nicholas Picchione for his life.

By January 1, 1964, the trust had accumulated the specified $50,000, and had begun to pay all its annual net income to Nicholas.

In fiduciary income tax returns for 1964, 1965, and 1966, the trust reported the receipts from the 1946 copyright sale

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[1] Although the Court of Appeals opinion, and the Tax Court opinion, refer to this corporation as one owned by Nicholas at the time of this sale in 1946, that fact is legally irrelevant. Neither opinion places any reliance on that fact, and properly so. See Section 1239 (c), Internal Revenue Code of 1954.

as long-term capital gain, claiming a deduction, however, for all such sums paid to Nicholas. In joint federal income tax returns for these years that he filed with Lillian, Nicholas also reported as long-term capital gain the said receipt that he as its beneficiary had received from the trust.

The Tax Court and the Court of Appeals treated the income received in 1964, 1965, and 1966 from the 1946 sale of the copyright as having the same character in the hands of the trust beneficiary, Nicholas Picchione, to whom it was distributed, as it had in the hands of the distributing trust. See Secs. 652(b), 662(b), I.R.C. 1954.

Before the Tax Court and the Court of Appeals, Nicholas Picchione argued that the character of such copyright sale proceeds received by the trust and distributed to him in 1964, 1965, and 1966 was long-term capital gain, because the copyright sold in 1946 was then, in 1946, a "capital asset" held by its sellers for more than six months.

Before the Tax Court and the Court of Appeals the Commissioner contended that the Revenue Act of 1950 in effect retrospectively changed the nature of the asset sold in 1946, from a capital to a non-capital asset, for the purpose of characterizing proceeds received after 1950.

The Tax Court (which had original jurisdiction of this case under Sec. 6213, Internal Revenue Code of 1954, 26 U.S.C. Sec. 6213, by virtue of a timely petition to it filed by Nicholas Picchione seeking redetermination of deficiencies in income tax determined by the Commissioner for 1964, 1965, and 1966) and the Court of Appeals for the First Circuit, held that the copyright sale proceeds received by the trust and distributed to Nicholas in 1964, 1965, and 1966 were proceeds from the sale of an asset that was not a capital asset, thus sustaining the Commissioner's position.

Reasons for Granting the Writ

A. The Conflict with the Decisions of this Court.

1. *As to nonretroactive, and literal, application of revenue code changes.*

That "retroactivity, even where permissible, is not favored, except upon the clearest mandate" is a rule of statutory construction which is uniformly followed. *Claridge Apartments Co.* v. *Commissioner,* 323 U.S. 141, 164 (1944); Note, *Setting Effective Dates for Tax Legislation: A Rule of Prospectivity,* 84 Harvard Law Review 436, 437 (1970), footnote 9.

On January 2, 1946, when Everett and Lillian Picchione sold their entire interest in the "Dome Simplified Weekly Bookkeeping Record", what they sold was a "capital asset" that they had owned for more than six months. There is no dispute about this. (R. 38, 39, 40)

More than four years later, on September 23, 1950, a statutory amendment excluded the kind of asset they had previously owned, but had sold in 1946, from the definition of a "capital asset". Section 210(a), Revenue Act of 1950, 64 Stat. 906, 932, 933.

This Revenue Act of 1950 contains no "clear mandate" on its face that this revised definition of "capital asset" was intended to be retroactively applied so as to change the "capital asset" character of the asset sold by Everett and Lillian Picchione on January 2, 1946.

The Revenue Act of 1950 on its face indicates that an exclusively prospective application was intended for this *purely definitional* change. 64 Stat. 933. Section 210(c), dealing *specifically* with the commencement date for the two *purely definitional* changes contained in the preceding subsections (a) and (b), provided:

"The amendments *made by this section* will be applicable with respect to taxable years beginning *after* the date of the enactment of this Act." (Emphasis supplied.)

It should prove helpful to compare the complete text of this definitional section before and after this 1950 amendment, so that the controlling importance in this context of the verb "held", denoting current or subsequent ownership, as distinguished from pre-1950 ownership, can be appreciated.

Before its amendment by the Revenue Act of 1950, Section 117(a) of the Internal Revenue Code of 1939 defined a "capital asset" as follows:

"Section 117. CAPITAL GAINS AND LOSSES.

(a) DEFINITIONS. — As used in this chapter —

(1) CAPITAL ASSETS. — The term 'capital assets' means property *held by the taxpayer* (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property *held by the taxpayer* primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1) or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not

exceeding one year from the date of issue, or real property used in the trade, or business of the taxpayer; . . ." (Emphasis supplied.)

Section 210(a) of the Revenue Act of 1950, 64 Stat. 906, 932, 933 added the following italized language, so that this "definition" section thereafter read:

"Section 117. CAPITAL GAINS AND LOSSES.

(a) DEFINITIONS. — As used in this chapter —

(1) CAPITAL ASSETS. — The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include —

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), or real property used in his trade or business;

(C) *a copywright; a literary, musical, or artistic composition; or similar property; held by* —

(i) *a taxpayer whose personal efforts created such property, or*

(ii) *a taxpayer in whose hands the basis of such*

property is determined for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property; or

(D) an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue."

The verb "held" is the operating verb in this amendment added by the Revenue Act of 1950. Since "held" recurs throughout this definitional section, plainly its meaning within this one section must be uniform.

In the revenue acts "held" has been authoritatively and consistently equated with the meaning "owned", by this and other Courts. *McFeely* v. *Commissioner,* 296 U.S. 102, 107, 108 (1935); *Paul* v. *Commissioner,* 206 F.2d 763, 764, (C.A. 3, 1953); *W. F. Marsh,* 12 T.C. 1083, 1090 (1949); *Ted F. Merrill,* 40 T.C. 66, 73, affm'd *Per Curiam* 336 F.2d 771 (C.A. 9, 1964).

The copyright interest that Everett and Lillian Picchione sold on January 2, 1946, was clearly not "held", i.e., "owned", by them over four years later in 1950 when this altered "capital asset" definition first became effective (accompanied by a statutory provision looking to its prospective application only). Their "holding" or ownership period had ended, and that of their corporate vendee had begun, more than four years earlier on January 2, 1946, when they conveyed their entire interest to the vendee corporation in return for its promise of periodic future pay-

ments. Cf. *William A. Cluff,* 17 T.C. 225, 230 (1951); *Richard W. Te Linde,* 18 T.C. 91, 95, 96 (1952); *Carl G. Dreymann,* 11 T.C. 153, 161-163 (1948); Rev. Rul. 54-607, 1954-2 C.B. 177, 178.

Only by an unwarranted retroactive application of this 1950 definitional amendment, without any "clear mandate" therefor in the amending statute, Cf. *Claridge Apartments Co.* v. *Commissioner, supra,* at page 164, can the position of the Court of Appeals in this case be sustained.

The instant Court of Appeals opinion states, nonetheless, that "literal meaning need not always be given to words in a statute, and congressional concern may be directed to substance rather than niceties of title . . . ." (Appendix C, page 46)

In response to the first of these two points, the Supreme Court has repeatedly indicated, and reaffirmed in recent years, that a literal reading of revenue acts is favored except in those rare occasions when relevant internal evidence in the statute itself, or a contrary legislative purpose, indicates a non-literal meaning should be preferred. In *Malat* v. *Riddell,* 383 U.S. 569, 571, 572 (1966), the Supreme Court stated:

> "As we have often said, 'the words of statutes — including revenue acts — should be interpreted where possible in their ordinary everyday senses.' Crane v. Commissioner, 333 U.S. 1,6. And see Hanover Bank v. Commissioner, 369 U.S. 672, 687-688; Commissioner v. Korell, 339 U.S. 619, 627-628. Departure from a literal reading of statutory language may, on occasion, be indicated by relevant internal evidence of the statute itself and necessary in order to effectuate the legislative purpose. See, e.g. Board of Governors v. Agnew, 329 U.S. 441, 446-448. But this is not such an occasion."

In response to the Court of Appeals statement that congressional concern *may* be directed to "substance" rather than "niceties of title" in some tax contexts, this statement must be balanced by the equally valid observation that congressional concern *may* and sometimes does deal with title as a matter of tax substance. To illustrate, a taxpayer's "holding period" for an asset is a matter of title but also a matter of tax substance, since a six-month holding period is the criterion selected by Congress for determining whether a taxpayer's gain from the sale of a capital asset is entitled to favorable long-term capital gain treatment.

Turning to the instant case, there is every reason to believe that Congress in 1950, when it amended the provision in question, used the word "held" in the straightforward sense attributed to it by the Supreme Court fifteen years earlier in 1935, in *McFeely* v. *Commissioner, supra.*[2] Plainly, then, Congress in 1950 intended to change the "capital asset" character only of assets then, or subsequently, "held" or "owned" by taxpayers, and did not intend a retroactive change in the character of the asset here involved, whose holding period in the hands of the individual Picchiones had terminated more than four years earlier on January 2, 1946.

2. *As to nonretroactive application of a change in a definitional provision.*

The opinion of the Court of Appeals suggests that a retroactive application of a revenue code change does not offend the Supreme Court's position mandating a purely

[2] Three dissenters in *McFeely* v. *Commissioner, supra,* would have interpreted "held" as meaning "possessed", in reliance on *Ogle* v. *Helvering,* 77 F.2d 338. Under that alternative definition it is equally clear that the individual Picchiones in 1950 did not "hold" this copyright that they had sold on January 2, 1946.

prospective application of statutory changes if the changed revenue provision is "not an operative section" but merely definitional in function. The opinion of the Court of Appeals states:

> "Apart from the fact that literal meaning need not always be given to words in a statute, and congressional concern may be directed to substance rather than niceties of title, section 117(a) of the 1939 Code, which contained the definition of capital assets, was not an operative section. It merely supplied definitions to be used in applying section 117(c), which authorized an alternative tax for that part of a taxpayer's income that was net long-term capital gain in any taxable year . . . ." (Appendix C, page 46)

If left unreviewed and unreversed this Court of Appeals opinion (which leaves obscure what it means by "an operative section") will inject fresh confusion into the interpretation of recurring annual Internal Revenue Code changes. In *Claridge Apartments Co.* v. *Commissioner, supra,* the Supreme Court clearly indicated that *all* statutory changes call for a nonretroactive application "except upon the clearest mandate". There the Supreme Court, without limiting its language to changes in "non-definitional" or "operative" sections of the Internal Revenue Code, said (page 164):

> "Retroactivity, even where permissible, is not favored, except upon the clearest mandate. It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed."

See also in this connection note, *Setting Effective Dates*

for Tax Legislation: A Rule of Prospectivity, supra, pp. 440, 441, footnote 34.

Moreover, the instant Court of Appeals opinion runs squarely counter to the position of the Supreme Court in *Reo Motors, Inc.* v. *Commissioner,* 338 U.S. 442 (1950). In that opinion the Supreme Court did deal with a change in a merely "definitional" section of the Internal Revenue Code.

Reo Motors, Inc., had in 1941 liquidated a wholly-owned sales subsidiary, incurring a substantial capital loss because the law then defined a "capital asset" as including stock in a wholly-owned subsidiary. In the immediately following year, Congress changed this definition so as to exclude stock in such a subsidiary. Relying on this change, Reo Motors, Inc., in 1942 contended that the loss in 1941 was now to be defined as one not incurred in disposing of a capital asset, but rather incurred in disposing of a non-capital asset, thereby giving rise to an ordinary loss in 1941 forming part of an operating loss carryover *that was available for future use in computing its 1942 corporate income tax.*

In both the *Reo Motors, Inc.* case and in the instant case the same fallacious argument was made that there is no offensively retroactive application of a revenue code change if the change is applied to effect only a change in the tax result or in the computation of taxes *for taxable years subsequent to the statutory change.* In *Reo Motors* it was a taxpayer who so argued; in the instant case, it is the Commissioner, seeking to apply a later definitional change in the law to a previously completed transaction, who advances this position.

In *Reo Motors* the unsuccessful taxpayer there was clearly not attempting to change the tax result or the computation of taxes for any year prior to the effective date of the 1942 amendment involved in that case. This is clear

from the Supreme Court's statement (pp. 445, 446) of the taxpayer's argument:

> "Since under the 1942 statutes, its loss on Reo Sales stock was an ordinary loss, it claims the right to include that loss in the computation of net operating loss for carry-over and deduction from gross income in 1942. While Section 101 of the Revenue Act of 1942, 26 U.S.C.A. Int. Rev. Acts, page 167, provides that "Except as otherwise expressly provided, the amendments made by this title shall be applicable only with respect to taxable years beginning after December 31, 1941, petitioner [Reo Motors] contends that this simply means that such amendments shall be applicable only *in computing tax liability* for tax years after December 31, 1941." (Emphasis in original.)

In disposing of that argument the Supreme Court said (page 449):

> "We also agree with the court below that the words of Section 101 of the Revenue Act of 1942, which states that the amendments enacted therein 'shall be applicable only with respect to taxable years beginning after December 31, 1941', cannot be read to mean 'shall be applicable only in computing tax liability for taxable years beginning after December, 1941.' To apply Section 23(g)(4) to establish a net operating loss is clearly to apply the 1942 amendment 'with respect to' 1941, contrary to the statute."

There is a striking similarity between this statutory language in this Revenue Act of 1942 that the Supreme Court interpreted in the *Reo Motors* case, and the statutory

language involved in the present case, that is, Section 210(c) of the Revenue Act of 1950 (64 Stat. 933), which reads:

> "The amendments made by this section shall be applicable with respect to taxable years beginning after the date of the enactment of this Act."

But, contrary to the Supreme Court's position in *Reo Motors* — where the Supreme Court held that a changed 1942 (and thereafter) definition of a capital asset could not be applied, in view of the quoted language, to the taxpayer's disposition of an asset in 1941, even for the limited purpose of determining the taxpayer's current 1942 income tax liability — the Court of Appeals for the First Circuit in the instant case held that a changed 1950 (and thereafter) definition of a capital asset could and should be applied to a taxpayer's disposition of an asset in 1946, for the purpose of determining income tax liability for all years after 1950.

Petitioners in the instant case contend that the Court of Appeals here flagrantly ignored the Supreme Court's position in *Reo Motors*. What the Court of Appeals did here was to equate "the amendments made by this section shall be applicable with respect to taxable years beginning after the date of the enactment of this Act", appearing in Section 210(c) of the Revenue Act of 1950, with "the amendments made by this section shall be applicable in computing tax liability for taxable years beginning after the date of the enactment of this Act". In its *Reo Motors* opinion, dealing with similar language, quoted above, the Supreme Court (page 449) denied the possibility of such an equation.

Indeed, in this *Reo Motors* opinion the Supreme Court twice denied the possibilty of such an equation, explicitly

in the body of that opinion (page 449), and inferentially in footnote 4 thereof (pp. 444, 445). In that footnote the Supreme Court "disapproved" of *Commissioner of Internal Revenue* v. *Moore,* 151 F.2d 527 (C.C.A. 5, 1945, which had affirmed 4 T.C. 404, 406 (1944). In *Moore,* the Tax Court and the Court of Appeals had similarly construed "with respect to" future years, appearing in an "effective date" provision for an Internal Revenue Code amendment, as meaning "in computing a tax liability for" future years.

When the *Reo Motors* case was before the Tax Court it perceived clearly that the taxpayer's argument there, apparently the same as that adopted by the Court of Appeals opinion in the instant case, constituted an attempt to apply retroactively a revised statutory definition of "capital asset", *Reo Motors, Inc.,* 9 T.C. 314, 319 (1947). In distinguishing its position in that case, later affirmed by the Court of Appeals (*Reo Motors, Inc.* v. *Commissioner,* 170 F.2d 1001 (C.A. 6, 1948)) and by the Supreme Court, from that taken in another earlier case, *Moore, Inc.,* 4 T.C. 404 (1944) affm'd 151 F.2d 527 (C.C.A. 5, 1945),[3] the Tax Court said (9 T.C. 319):

> "The determination there [in *Moore, Inc.*] did not involve the question we have here, namely, whether subdivision (4), added by the 1942 Act to section 23(g) as it existed in 1941, *retroactively converted a capital asset to a noncapital asset* and hence, in the instant case, a capital loss to an ordinary loss.
>
> The *Moore* case dealt only with the question of whether section 122(d)(4) of the 1942 Act, instead of section 122(d)(4) as it existed in 1941, governed the treatment to be accorded gains and losses arising

[3] As indicated earlier in this brief, the Supreme Court has since "disapproved" of this *Moore, Inc.* opinion.

> from sales or exchanges of capital assets in determining whether there was a deductible net operating loss carryover from 1941 to 1942. *It did not involve the question of whether a change was retroactively effected in the character of such assets from capital to non-capital assets by virtue of the provisions of section 23(g)(4) and 122(d)(4) as they existed in 1942.*" (Emphasis supplied.)

In its opinion in *Reo Motors* the full Tax Court also stated (9 T.C. 318):

> "Under the law as it existed in 1941 the stock in respect of which the loss in question was sustained was a capital asset, but if the stock in question had been similarly *held in 1942,* it would not be a capital asset because of the adding in that year of subdivision (4) to section 23(g)." (Emphasis supplied.)

The implication is plain that, in the opinion of the Tax Court, later sustained by the Supreme Court in *Reo Motors, Inc.,* v. *Commissioner, supra,* the asset there in question was not "held", that is owned, by the taxpayer at the time of the 1942 amendment, and therefore the 1942 statutory amendment in that case did not retroactively convert what was throughout the taxpayer's holding period, ending in 1941, a capital asset into a noncapital asset.

Similarly, applying *Reo Motors, Inc.* v. *Commissioner, supra,* to the instant case, the asset here in question was not "held", that is owned, by the taxpayers at the time of the 1950 amendment, and therefore this 1950 amendment did not retroactively convert what was throughout the taxpayers' holding period ending in 1946, a capital asset into a noncapital asset.

3. *As to the effect of committee reports on an otherwise clear statute.*

The face of this 1950 Revenue Act disclose no warrant for any retroactive application of its changed definition of a "capital asset". The opinion of the Court of Appeals in attempting to justify not attributing "literal meaning" to this 1950 statute seems to concede as much, that is, taken "literally" this 1950 statute reflects a purely prospective intent only for its definitional change of a "capital asset".

Nevertheless, the Court of Appeals proceeded to examine legislative history. Employing the following language, it found a basis for applying this new 1950 revised definition of a "capital asset" retroactively to all assets sold before 1950, for which payment was to be received after 1950:

> "Any ambiguity that may be thought to exist is resolved by examination of the legislative history of the 1950 act. The report of the Senate Finance Committee contains the following explanation of the effect of the amendment on installment sales made prior to its effective date.
>
> > 'In the case of the sale, prior to the effective date of the amendment, of an artistic work by a creator who has elected the installment basis under section 44, the tax treatment of installment payments received after such effective date will be governed by the rule of *Snell* v. *Commissoner* (97 Fed. (2d) 891).' S. Rep. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 483, 544. (Appendix C, page 47)

The same language is contained in a House report. H.R. Rep. No. 2319, 81st Cong., 2d Sess., 1950-2 C.B.

> 380, 447. *Snell* v. *Commissioner,* 5 Cir., 1938, 97 F.2d 891, holds that in the case of installment sales the law in effect at the time the payment is received, not at the time of the sale, determines the character of the income. The general intention of Congress with respect to receipts from the sale of copyrights sold prior to the passage of the amendment thus seems apparent. *Stern* v. *United States,* E.D.La., 1958, 164 F. Supp. 847, 851-53, *aff'd per curiam,* 262 F.2d 597, *cert. denied* 359 U.S. 969. Taxpayer's attempts to distinguish *Snell* on the ground that it was wrongly decided, or because of incidental differences with the present case are beside the mark. We are not considering whether the *Snell* decision governs the case at bar, but are looking to it only to verify our conclusion as to Congress' intent."

This quoted committee language does not disclose a generally retroactive purpose behind this 1950 revenue act change, which purpose would indeed be in clear contradiction of the purely prospective language appearing on the face of the statute itself (Section 210(c)). This committee language is confined narrowly, viz, to "a creator who has elected the installment basis under section 44". The Court of Appeals opinion, however, blandly ignores this restrictive language.

In the instant case it was stipulated by the parties that the petitioners here did not elect the installment basis under section 44. The stipulation reads (R. 35):

> "18. Neither Lillian B. Picchione, nor N. Everett Picchione, nor Dome Enterprises Trust, nor Nicholas Picchione acting as trustee of the said trust, at any time elected to report proceeds from the sale of the said copyright under Section 44 of the Internal Rev-

enue Code of 1939 or the predecessor or successor sections to said section 44 of the 1939 Code."

Obviously, then, this committee report language should not have been invoked as dispositive of the instant case.[4]

Aditionally, the quoted committee report language cannot and should not be interpreted to subvert or contradict the generally prospective intent expressed in the 1950 statute itself. Section 210(c), Revenue Act of 1950, 64 Stat. 933.

Petitioners contend that the framers of these committee reports had in mind a limited and special situation, wholly different from the present case but like that in the cited *Snell* case itself, viz., a situation under an executory contract where a "seller" of an asset who had elected the installment basis under Section 44 (before a statutory change excluded the asset being sold from the definition of a capital asset) nevertheless continued, under his contract, to own and hold title to the asset up to and beyond the time when a subsequent statutory change excluded it from the definition of a capital asset. In such a special situation, installment proceeds received by the "seller" *after* the date of the statutory change would not in his hands qualify as proceeds from the sale of a capital asset. Put in another way, since such a "seller" still "held" or "owned" the asset in question on the effective date of the statutory change, the statutory change would apply to his sales receipts thereafter under an executory selling agreement that he entered into before the date of the statutory change.

A close examination of the *Snell* case indicates that such

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[4] There are important tax differences between the "installment basis" of reporting income from a sale (the only method referred to in these 1950 Committee Reports) and the "deferred payment" method (the method used by the instant taxpayer). Cf. *Mamula* v. *Commissioner*, 346 F.2d 1016 (C.A. 9, 1965); *Gralapp* v. *United States*, 70-2 USTC Par. 9628, 26 AFTR 2d 70-5642 (D.W.D. Kan. 1970).

was the factual situation in that case. Unlike the present case, it did not involve a sale fully completed by a seller several years before a statutory change excluded the asset so sold from the definition of a capital asset. The *Snell* case involved an executory contract under which the "seller" received some installments, which he had elected to report under the so-called installment method, after a statutory change in the nature of such asset. The taxpayer in *Snell* not only retained ownership of the "sold" asset *before and after* the statutory change there involved, but until the payment of the last installment due under his executory contracts. This appears from the following language in the Board of Tax Appeals memorandum opinion in *Snell:*

> "In selling real estate it was the petitioner's practice, and also the partnership's practice, to secure as large a down payment as possible, the balance to be paid in one and two years with interest at eight percent per annum. In the majority of cases the down payment was 25 percent to 33-1/3 percent of the purchase price, but terms were varied to suit the purchaser. *Title to the property sold remained in the vendor until after the contract price was paid.* From time to time purchasers were unable to pay the purchase price and the property had to be resold. (Emphasis supplied.)

C. Perry Snell, 1936 Prentice Hall B.T.A. Memorandum Decision, Paragraph 36,335, affm'd *Snell* v. *Commissioner,* 97 F.2d 891 (C.C.A. 5, 1938).

Clearly, then, the Court of Appeals in the instant case has grossly misread and expanded the language of these 1950 Committee reports. The Court of Appeals thus acted improperly, and contrary to the position of the Supreme Court, in permitting its gratuitously broadened reading of

such committee report language to override clear statutory language in the 1950 Revenue Act itself (indicating a generally prospective intent only for the revised definition therein of a capital asset).

In *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932), the Supreme Court refused to give effect to statements in a House and a Senate Committee report that the Supreme Court found to be contrary to the natural import of language appearing in the statute itself. The Supreme Court stated that the purpose behind resort to extrinsic aids such as committee reports was "to *solve* but not to *create* an ambiguity" found in the statute itself. The instant Court of Appeals opinion is a clear violation of that principle of statutory construction.

4. *As to the presence of a potential constitutional issue that should be avoided by a nonretrospective application of the 1950 change in the "capital asset" character of a copyright.*

A statutory interpretation that raises a constitutional question should, if possible, be avoided. In *Blodgett* v. *Holden*, 275 U.S. 142, 276 U.S. 594 (1928), Mr. Justice Holmes cited a number of cases in support of this statement:

> "... the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. *Even to avoid a serious doubt the rule is the same.*" (Emphasis supplied.)

This rule of statutory construction was expressed again by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936):

> "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. ****
>
> " 'When the validity of an act of the Congress is drawn in question, and event if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided,' ***"

Here, petitioners submit, a constitutional issue is presented by this record because the interpretation of the Court of Appeals applies a 1950 revenue code change retroactively so as to change the tax character of a sale completed more than four years earlier on January 2, 1946, by sellers who then had every reason to believe the proceeds therefrom would be entitled to favorable long-term capital gain treatment.

The Court of Appeals opinion, in the instant case, states, however:

> "We remark, in passing, that we are not persuaded of the relevancy of taxpayer's references to certain cases where the Court said that retrospective application of tax laws should be made only when there is a clear congressional mandate. *See, e.g., Claridge Apartments Co.* v. *Commissioner,* 1944, 323 U.S. 141, 164; *Brewster* v. *Gage,* 1930, 280 U.S. 327, 337. Taxpayer's cases involve the application of statutes to income re-

> ceived in years prior to their enactment. Here we are considering only the taxation of income received subsequent to the adoption of the statute, a far less drastic imposition. By the same token we are not persuaded that the Tax Court's interpretation of the statute makes it unconstitutional. Retrospective taxation, even to the exent of applying a statute to impose new tax burdens on taxable events that occurred prior to the enactment of the statute, is not necessarily unconstitutional. *United States* v. *Hudson,* 1937, 299 U.S. 498; *Brushaber* v. *Union Pac. R.R.,* 1916, 240 U.S. 1. To be unconstitutional, the result must be so harsh and oppressive as to amount to a denial of due process. *Welch* v. *Henry,* 1938, 305 U.S. 134, 147. In *Welch* the Court upheld the application of a 1935 change in state income tax rates to income earned and reported in 1933." (Appendix C, page 48)

The statement that "taxpayer's cases involve the application of statutes to income received in years prior to their enactment" wholly ignores the *Reo Motors* case, discussed earlier in this brief, which was liberally cited and relied upon in the taxpayer's brief before the Court of Appeals. *Reo Motors* was a case of an attempted retroactive application of a "capital asset" definitional change limited, however, to affecting future income tax liability only.

Moreover, the instant Court of Appeals opinion appears to suggest that there is no issue of retroactivity here at all, because "we are considering only the taxation of income received subsequent to the adoption of the [amending] statute".

A retroactive statute is "one which purports to determine the legal significance of acts or events that have occurred prior to the date of its enactment": Greenblatt, *Judicial Limitations on Retroactive Civil Legislation,* 51

Nw. U. L. Rev. 540, 544, 545 (1956). Although the most common type of retroactive legislation is "the statute which reaches back to prior years and adds new legal rights and responsibilities to completed transactions . . . there may be retroactive provisions which operate only prospectively but which affect prior completed transactions." Note, *Setting Effective Dates for Tax Legislation: A Rule of Prospectivity, supra,* pp. 436, 437, footnote 12.

In the instant case the Court of Appeals interpreted the 1950 Revenue Act as purporting to change (from capital to non-capital) the legal and tax nature of an asset sold more than four years earlier on January 2, 1946—for the purpose of characterizing proceeds therefrom, received after 1950, as proceeds from the sale of a non-capital asset. Thus, giving a four-year retroactive thrust to the definitional change of a "capital asset" in the 1950 Revenue Act was essential to the reasoning of, and the end result reached by, the Court of Appeals in this case.[5]

There are two bases for distinguishing the reliance by the Court of Appeals on *Welch* v. *Henry, supra.*

First, *Welch* v. *Henry, supra,* indicates that limited retroactivity is not offensive where the retroactively affected event is an "involuntary" event, such as the receipt of dividends in that case. There the Supreme Court said (305 U.S. 134, 147):

> "In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the

[5] See also *Helvering* v. *Helmholz,* 296 U.S. 93 (1935) discussed later in this brief (page 28) where a unanimous Supreme Court found retroactive an amendatory revenue act that according to the Commissioner changed the nature of a prior completed transfer, even though the tax-generating event in that case, the transferor's death, occurred after the enactment of the amending revenue act.

tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. Nichols v. Coolidge, 274 U.S. 531, 542, 47 S.Ct. 710, 713, 71 L.Ed. 1184, 52 A.L.R. 1081; Untermeyer v. Anderson, 276 U.S. 440, 445, 48 S.Ct. 353, 354, 72 L.Ed. 645 (citing Blodgett v. Holden, 275 U.S. 142, 147, 48 S.Ct. 105, 106, 72 L.Ed. 206); Coolidge v. Long, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562. Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy, Milliken v. United States, supra. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.***"

The opinion in *Welch* v. *Henry, supra,* proceeds to explain what is meant by its reference to the "involuntary" event in that case (page 148):

"We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one."

In the instant case, however, the retroactively affected event is the "voluntary" sale of an asset completed on January 2, 1946, more than four years before the Revenue Act of 1950, enacted into law on September 23, 1950, purportedly made a "definitional" change in the tax nature of the asset so sold. On January 2, 1946, the individual Picchiones (and similar copyright holders) had no reason to believe that Congress was then contemplating a future change in the nature of the asset the Picchiones sold on that day.[6] Moreover, they had every reason to believe that, applying normal rules of statutory construction, any future legislative change of this nature would apply prospectively only, to copyrights "held" at or near the time of such future legislative change. Had they any reason to anticipate, in 1946, the later 1950 change in the nature of the asset they sold, and its surprising retroactive application to their completed 1946 sale, the individual Picchiones could have avoided their present problem simply by arranging for a lump-sum payment in 1946.

Secondly, *Welch* v. *Henry, supra,* suggests that retroactive application of a taxing statute to an "involuntary" taxable event occurring one or two years before the amending statute is constitutionally inoffensive, but it plainly leaves open the question, present on this record, whether a later amendment can retroactively redefine, to a taxpayer's prejudice, the tax nature of a "voluntary" sale completed some four to five years before enactment of an amending statute. In *Welch* v. *Henry, supra,* the Supreme Court said:

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[6] Nor did anyone else, including the Commissioner of Internal Revenue. Indeed, some two and one-half years later, on June 2, 1948, the then Internal Revenue Bureau announced that General Dwight D. Eisenhower was entitled to long-term capital gain treatment "on the price for which he sells his copyright" interest in his memoirs, *Crusade in Europe.* Eulenberg, *Books and Mousetraps,* 54 A.B.A.J. 1173, 1174 (1968).

Page 148:

"Assuming that a tax may attempt to reach events so far in the past as to render that objection valid, we think that no such case is presented here. For more than seventy-five years it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session. See Untermeyer v. Anderson, supra, Footnote 1. These statutes not only increased the tax burden by laying new taxes and increasing the rates of old ones or both, but they redistributed retroactively the tax burdens imposed by preexisting laws.***

Page 150:

"***In the present case, the returns of income received in 1933 were filed and became available in March, 1934. Wisconsin Stat. 1933, § 71.09(4). The next succeeding session of the legislature at which tax legislation could be considered was in 1935, when the challenged statute was passed. By § 11, Art. 4, § 4, Art. 5, of the Wisconsin constitution, and § 13.02 Wisconsin Statutes, 1935, regular sessions of the legislature are held in each odd-numbered year. Special sessions of the legislature may be held on call of the governor, at which no business can be transacted 'except as shall be necessary to accomplish the special purposes for which it was convened.' A special session was called by the governor in 1934, but for purposes unrelated to taxation. Proclamations of the Governor of Wisconsin December 2, 28, 1933, January 18, 22, 30, 1934.

> Thus the legislature in 1935, at the first opportunity after the tax year in which the income was received, made its revision of the tax laws applicable to 1933 income, as did Congress in the Joint Resolution of July 4, 1864, commented on in Stockdale v. Insurance Companies, supra.
>
> "While the Supreme Court of Wisconsin, 223 Wis. 319, 271 N.W. 68, 72 thought that the present tax might 'approach or reach the limit of permissible retroactivity', we cannot say that it exceeds it."

The case of *Helvering* v. *Helmholz,* 296 U.S. 93 (1935) suggests the gravity of the constitutional issue raised on this record by the interpretation of the Court of Appeals applying retroactively the new 1950 revised definition of a "capital asset" to a sale completed in 1946. In *Helvering* v. *Helmholz, supra,* a woman in 1918 made an inter vivos transfer to a trust, reserving the net income for life and a testamentary power to appoint the trust property. At that time, in 1918, such a transfer would not have been includible in the settlor's gross estate for federal estate tax purposes. Eight years later, by the Revenue Act of 1926, Congress inserted new language by which, according to the Commissioner, such a transfer was now includible in the estate of a transferor dying thereafter. The settlor died in 1927; thereafter, the Commissioner sought to include this 1918 transfer in the decedent's gross taxable estate, relying on the 1926 amendment. The Supreme Court—in an opinion that was on this point unanimous—held as follows (pp. 97-98):

> "Another and more serious objection to the application of section 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no

interest in the grantor. She reserved no power in herself alone to revoke, to alter, or to amend. Under the revenue act then in force, the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. Reinecke v. Northern Trust Company, 278 U.S. 339, 49 S. Ct. 123, 73 L. Ed. 410, 66 A.L.R. 397. If section 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case, its operation would violate the Fifth Amendment. Nichols v. Coolidge, 274 U.S. 531, 47 S.Ct. 710, 71 L. Ed. 1184, 52 A.L.R. 1081."

5. *As to the necessity for determining the character of income by reference to the origin of a transaction.*

Prior to 1951 the view was held in some quarters that the "annual accounting" method of reporting income, and taking deductions, required that each taxable year in which a taxable event occurred should be looked at by itself, and kept strictly isolated from the character of the originating transaction occurring in any prior year.

Thus, where stockholders liquidated a corporation, realizing capital gain in 1941, but were thereafter required in 1944 to repay part of what they had received, the Tax Court held that the repayment was an "ordinary" loss in 1944 because the stockholders had not sold or exchanged any capital asset in 1944. *Stanley Switlik,* 13 T.C. 121, 127 (1949), affm'd 184 F.2d 299 (C.A. 3, 1950). This reflected "the concept of the single year as the unit of taxation". 184 F.2d 301.

The Tax Court later decided *Frederick R. Bauer,* 15 T.C. 876 (1950), reaffirming on parallel facts its position in the *Switlik* case.

Then in 1951 the *Frederick R. Bauer* case, on the Com-

missioner's initiative, came up on appeal to the Court of Appeals for the Second Circuit, which reversed the Tax Court under the name of *Commissioner* v. *Arrowsmith*, 193 F.2d 734 (C.A. 2, 1951). There, for the first time, apparently, a Court decided that "the theory of the single year as the unit of taxation" did not preclude an examination of the originating transaction in prior years for the purpose of determining "how a gain or loss is to be categorized in computing taxable income for the year in which the new fact happened." 193 F.2d 735.

This conflict between the Second and Third Circuits set the stage for the Supreme Court's opinion in *Arrowsmith* v. *Commissioner*, 344 U.S. 6 (1952), affirming the Second Circuit, and disapproving of the view of the Third Circuit in *Switlik*.

Accordingly, the previously held view that "annual tax accounting" required a disregard of the nature of the originating transaction in a prior year, received its death blow in 1952 at the hands of the Supreme Court.

There is little need to cite or discuss the numerous cases that have since 1952 cited *Arrowsmith* for the proposition that the "character" of a payment or of a receipt in a later year is to be determined by the character of the originating transaction occurring in an earlier year. But see, in particular, *Alvin B. Lowe*, 44 T.C. 363, 373-375 (1965), and cases cited therein; *Rees Blow Pipe Manufacturing Company*, 41 T.C. 598, affm'd 342 F.2d 990 (C.A. 9, 1965); *Harold Wener*, 24 T.C. 529, 533 (1955), affm'd 242 F.2d 938 (C.A. 9, 1957); *Commissioner* v. *Adam, Meldrum & Anderson Co., Inc.*, 215 F.2d 163 (C.A. 2, 1954), rev'g 19 T.C. 1130 (1953).

In short, the "annual tax accounting" concept (like the installment method of reporting income) has since 1952 been authoritatively limited to the "timing" of the receipt of income or the taking of deductions; it does not control

the "characterization" of income and deductions of a later year that stem from a tax event of an earlier year.

In the instant case, it is the sale of a "capital asset" in 1946 that fastens a "capital gain" tax "character" on receipts proceeding directly therefrom in 1964, 1965, and 1966. There was unquestionably an "integral relationship" between the sale in 1946 and the receipts proceeding therefrom in 1964, 1965, and 1966. Cf. *John E. Turco,* 52 T.C. 631, 634, 635 (1969).

To illustrate how far the *Arrowsmith* doctrine has altered the law from the time when the Congressional committees in 1950 drafted their reference to "the rule of Snell v. Commissioner", on which the instant Court of Appeals opinion relies, attention is invited to the language from a recent Court of Claims opinion, *Murray* v. *United States,* 426 F.2d 376, 381 (1970):

> "Plaintiff elected to report the profit from that transaction under the installment method of section 453 of the Internal Revenue Code of 1954. The function of section 453 is one of timing, not characterization. That is to say, use of the installment method defers the reporting of taxable gain, but in no way characterizes the nature of the gain. Certain statutory requisites having been satisfied, either capital gain or ordinary gain may be reported on the installment method, the character of the gain being determined by the nature of the underlying transaction.
>
> "Plaintiff's transfer of his interest in the Gordon tract constituted a completed sale in 1955. And, the character of the transactional gain was fixed by the relevant circumstances surrounding that *sole tax-operative event,* irrespective of future changes in dealings or relationships; only the *reporting* of taxable gain was deferred. ***" (Emphasis in original.)

And in footnote (footnote 5, 426 F.2d 381), the Court of Claims refers to *Arrowsmith* as follows:

> "Plaintiff refers us to *Arrowsmith* v. *Commissioner*, 344 U.S. 6 (1952), wherein the Supreme Court held that the character of losses sustained by the taxpayers by virtue of their liability as transferees of liquidation distribution assets, was nonetheless determined by the character of the earlier liquidation distribution.*** If anything, *Arrowsmith* endorses the proposition .... that the character of plaintiff's gain was ... forever determined by the character of the transaction as it occurred in 1955."

That is petitioners' argument in the instant case, viz., the character of petitioners' gain from the copyright sale in 1946 was determined by the character of the transaction as it occurred in 1946; therefore the 1950 revenue act amendment may not be invoked to characterize proceeds received after 1950, at least in the absence of a clearly expressed retroactive intent by Congress, expressed in the 1950 statutory language itself.

The instant Court of Appeals opinion is based on an attempted revival of a discredited pre-*Arrowsmith* view of the law, which view held that the character of income is determined solely by reference to the year in which income is received, without regard to the nature of the originating transaction in an earlier year. Indeed, the language that the instant Court of Appeals opinion mainly cites (footnote 2) and mainly relies upon is drawn from the pre-*Arrowsmith* case of *Snell* v. *Commissioner*, 97 F.2d 891 (C. C.A. 5, 1938).

The instant record thus raises an additional novel and important legal question. Is questionable case law placed

beyond question by what may — or may not be — an approving reference to it in a congressional committee report?

For the purpose of this part of petitioners' argument, it will be assumed that the framers of the 1950 Committee reports—when they referred to the "rule of Snell v. Commissioner"— had in mind not the narrow reading of this "rule"[7] that petitioners argue for, but the expansive reading favored by the instant Court of Appeals opinion. Since, as petitioners contend, the doctrine of this *Snell* case has over the last twenty years been sapped by *Arrowsmith* and its progeny of all vitality, it was improper for the Court of Appeals in the instant case to attach controlling significance to the incorporation in the 1950 committee reports of a reference to "the rule of Snell v. Commissioner".

Petitioners contend that bad—or subsequently discredited—case law is not improved or saved by prior incorporation into congressional committee reports. Because the framers of these 1950 committee reports as late as 1950 expressed an "opinion" or an "expectation" that the *Snell* case would have continuing applicability in a specific factual context (unlike the present case) certainly does not entitle the *Snell* case to immortality, and to expansion beyond its specific factual context. Otherwise any questionable legal opinion of an inferior court once encased in a Congressional Committee report would take on an importance exceeding that of a Supreme Court opinion, which is always susceptible of later correction, confinement to its specific facts, or outright reversal.

The instant Court of Appeals opinion wholly avoids the question of the current soundness of *Snell*. It states:

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[7] Limited to pre-1950 "sellers" who had elected the "installment basis" of reporting income from such sales under Section 44 of the 1939 Code.

> "Taxpayer's attempts to distinguish *Snell* on the ground that it was wrongly decided, or because of incidental differences with the present care are beside the mark. We are not considering whether the *Snell* decision governs the case at bar, but are looking to it only to verify our conclusion as to Congress' intent." (Appendix C, pages 47, 48)

Petitioners submit that the 1950 Committee Report language does not reflect a generally retroactive congressional "intent" at all. At the most, all such language does reflect is a pre-*Arrowsmith* opinion or prophecy or expectation that the courts would apply *Snell* v. *Commissioner* in a specific factual situation, viz., to proceeds received after 1950 "by a creator who has elected the installment basis under section 44" before 1950. But that factual situation does not fit the instant case.

Petitioners contend that no court should attribute to Congress, or to its committees, an "intent" to preserve and to expand in perpetuity an erroneously decided opinion of a lower federal court simply because it was referred to in a congressional committee report before its error was called into question.

The simplistic rule of this *Snell* case, as interpreted by the Court of Appeals opinion, viz., that the character of income is to be solely determined by referring to the substantive revenue law as it reads in the year when income is received, not only runs counter to *Arrowsmith,* but, if *Snell* is considered to have Congressional approval, calls into question the good sense of one Congress after another in legislating numerous "effective dates" for recurring amendments to the Internal Revenue Code. If *Snell* is deemed to reflect the "intent" of the 1950 Congress, and of subsequent Congresses, that the character of any income received is

to be determined solely by referring to the text of the Internal Revenue Code as it reads in the year when such income is received, then it would seem all code changes, beginning with 1950 and thereafter, have a built-in "effective date" provision rendering specific "effective date" provisions wholly unnecessary. Yet the 1950 Congress saw fit to enact Section 210(c), providing a *specific future*[8] "effective date" provision for the exclusion of copyrights from "capital asset" status. More recently, the Congress that enacted the Tax Reform Act of 1969 legislated numerous specific "effective date" provisions, apparently in disregard or in ignorance or in contradiction of *Snell.* One commentator has summarized the "effective date" provisions of the Tax Reform Act of 1969 in the following language:

> "The 152 substantive provisions of the Tax Reform Act of 1969 take effect according to eighty-five different time schedules which employ over forty different specific dates. Many provisions are effective immediately upon passage, others are delayed for a period of days, months, even years. Still others are made retroactive to any one of twenty different pre-enactment dates."

Note, *Setting Effective Dates for Tax Legislation: A Rule of Prospectivity, supra,* page 436.

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[8] Although the Revenue Act of 1950 was signed into law on September 23, 1950, the exclusion of copyrights from "capital asset" status for most taxpayers (that is, those reporting income on a calendar year basis) did not become "effective" until January 1, 1951. Section 210(c), Revenue Act of 1950; 64 Stat. 906, 932, 933.

Conclusion

For the foregoing reasons, this writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

54 T. C. (No. 141) 1490

UNITED STATES TAX COURT

NICHOLAS PICCHIONE AND LILLIAN B. PICCHIONE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 1271-69. Filed July 15, 1970.

In 1946, the copyright of a record book was sold in consideration of periodic future payments until October 1, 1973. The author-petitioner was not engaged in the business of originating literary materials.

Held, the definition of "capital asset" in sec. 1221, I.R.C. 1954, rather than in sec. 117(a)(1), I.R.C. 1939, in the form in effect prior to amendments included in the Revenue Act of 1950, determine the tax character of receipts in 1964, 1965, and 1966; such receipts are ordinary income, not capital gain.

James R. McGowan and *Lester H. Salter,* for the petitioners. *Robert B. Dugan,* for the respondent.

OPINION

FEATHERSTON, *Judge:* Respondent determined deficiencies in petitioners' Federal income tax as follows:

Year	*Deficiency*
1964	$2,297.61
1965	4,803.16
1966	5,837.99

The only issue is whether amounts received by petitioner Nicholas Picchione from the Dome Enterprises Trust during 1964, 1965, and 1966 are taxable as ordinary income or capital gain.

Nicholas Picchione and Lillian B. Picchione, husband and wife, resided in Providence, Rhode Island, at the time

their petition was filed. Employing the cash method of accounting, they filed joint Federal income tax returns for 1964 through 1966 with the district director of internal revenue for the District of Rhode Island. Lillian B. Picchione (hereafter Lillian) is a petitioner in this proceeding solely because she filed a joint return with her husband. Nicholas Picchione will sometimes hereafter be referred to as "petitioner."

Briefly summarized, the facts, all stipulated, show that petitioner, a certified public accountant, originated a record book entitled "Dome Simplified Weekly Bookkeeping Record" (hereafter Record Book). Before January 1, 1945, he transferred his entire interest therein to his wife, Lillian, and his son Everett Picchione (hereafter Everett). During 1945 Lillian and Everett applied for and obtained a copyright on the Record Book and, on January 2, 1946, sold their interests in the Record Book to a corporation owned, at that time, by Nicholas. The consideration for this sale was the right to receive monthly payments equal to 20 percent of the gross selling price of all books sold until October 1, 1973.

At the time of the sale neither Nicholas, or Lillian, nor Everett, was engaged in the business of originating literary materials.

In 1952 Lillian and Everett transferred their rights in the future payments to the Dome Enterprises Trust (hereafter Trust). When the Trust had accumulated income in the amount of $50,000, the trustee was thereafter to pay the net income to petitioner for life. By January 1, 1964, the Trust had made the specified accumulation and was paying its annual income to him.

In its fiduciary income tax returns for 1964, 1965, and 1966, the Trust reported the receipts from the sale of the copyright as long-term capital gain, claiming a deduction for the sums paid to petitioner. In their joint income tax

returns for those years, petitioners reported the receipts from the Trust as long-term capital gain. Respondent determined that the receipts are not capital gain but are ordinary income.

Petitioner contends that the applicable provisions of the 1939 Code, as they stood at the time of the sale of the copyright in 1946, characterize his Trust receipts in 1964, 1965, and 1966 as long-term capital gain.[1] Respondent maintains that the definition of "capital asset" in section 1221 of the 1954 Code, derived from section 117(a)(1) of the 1939 Code as amended by section 210 of the Revenue Act of 1950, 64 Stat. 932-933, characterizes petitioner's Trust receipts as ordinary income. These contentions of the parties pose the issue to be decided.

Prior to 1950, the definition of a capital asset made it possible for a creative individual to sell his literary or artistic output and pay tax on the profits at capital gain rates as long as he could show his work was not property held primarily for sale in the ordinary course of his business. *Stern* v. *United States,* 164 F.Supp. 847 (E.D. La. 1958), affirmed per curiam 262 F.2d 957 (C.A. 5, 1959). Congress was dissatisfied with this rule and changed it by section 210 of the Revenue Act of 1950. H. Rept. No. 2319, 81st Cong., 2d Sess., 1950-2 C.B. 445-447; S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 543-544; H. Conf. Rept. No. 3124, 81st Cong., 2d Sess., 1950-2 C.B. 585. The change was accomplished by an amendment modifying the definition of "capital assets" to exclude, under stated conditions, a copyright; or a literary, musical, or artistic composition; or similar property.[2] As to the effective date of the change, section 210(c) states:

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[1] The character of the income to petitioner is the same as it is to the Trust. Secs. 652(b), 662(b), I.R.C. 1954.

[2] Revenue Act of 1950, 64 Stat. 932-933, sec. 210(a), provides:

(a) Definition of Capital Assets. —Section 117(a)(1) [of

> The amendments made by this section shall be applicable with respect to taxable years beginning after the date of the enactment of this Act.

Emphasizing that the 1950 amendments related only to the definition of the term "capital assets," petitioner points out that even the revised definition refers to a copyright "held" by the taxpayer. Citing *McFeely* v. *Commissioner,* 296 U.S. 102, 107, 108 (1935), he argues that "held" means "owned," and that he did not own the copyright on the effective date of the amendment and, indeed, has not owned it since January 2, 1946, when it was sold.

Although petitioner's argument is skillfully presented, we think it is without merit. In our view, his income tax on his copyright income for 1964, 1965, and 1966 is to be determined by reference to the definition of the term "capital asset" in section 1221, I.R.C. 1954, in the form in effect in those years. This is the clear import of the following explanation in S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-

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> the 1939 Code] (relating to the definition of capital assets) is hereby amended to read as follows:
>
> "(1) Capital Assets. — The term 'capital assets' means property held by the taxpayer * * *, but does not include—
>
> * * *
>
> "(C) a copyright; a literary, musical, or artistic composition; or similar property; held by —
>
> "(i) a taxpayer whose personal efforts created such property, or
>
> "(ii) a taxpayer in whose hands the basis of such property is determined, for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property; or"
>
> * * *

This amendment was carried forward as part of sec. 1221, I.R.C. 1954.

Lillian's and Everett's basis in the Record Book is determined by what it was in the hands of petitioner, its creator, and petitioner does not contend otherwise.

2 C.B. 544, accompanying the Revenue Act of 1950:

> In the case of the sale, prior to the effective date of the amendment, of an artistic work by a creator who has elected the installment basis under section 44, the tax treatment of installment payments received after such effective date will be governed by the rule of *Snell* v. *Commissioner,* (97 Fed. (2d) 891).

Snell v. *Commissioner,* 97 F.2d 891 (C.A. 5, 1938), referred to in the report, holds that in the case of installment sales the law in effect at the time payment is made, rather than the time of the sale, determines the character of the income. See also *Zola Klein,* 42 T.C. 1000 (1964); *Harry B. Golden,* 47 B.T.A. 94 (1942). While petitioners reported their income under the deferred payment rather than the installment method of accounting, such a fine distinction does not alter the rule. The statement in the Committee Reports, we think, was merely illustrative and was not intended to restrict the applicability of the principle. We hold, therefore, that petitioner is not entitled to capital gain treatment of his 1964, 1965, and 1966 receipts from the copyright.

We are aware of the Supreme Court's teaching that a court should give amendments to the Code "prospective application only, unless otherwise specifically provided." *Reo Motors* v. *Commissioner,* 338 U.S. 442, 450 (1950); cf. *Southeast Equipment Corporation,* 33 T.C. 702 (1960), affd. 289 F.2d 493 (C.A. 6, 1961). But that principle is not involved here; it refers to amendments which would change the tax results of years prior to the new enactment. Here, our interpretation of the 1950 amendments would not affect the tax result for any year prior to the enactment. It would merely apply the revised definition of capital assets in the computation of taxes for years subsequent to the enactment, regardless of when the transaction pro-

ducing the gain occurred. This holding, in our view, is required by the language and legislative history of the 1950 amendments.

We conclude that for 1964, 1965, and 1966 petitioner's receipts from the Trust are ordinary income rather than capital gain.

Decision will be entered for the respondent.

APPENDIX B

TAX COURT OF THE UNITED STATES

WASHINGTON

Docket No. 1271-69.

NICHOLAS PICCHIONE AND
LILLIAN B. PICCHIONE,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed July 15, 1970, it is

ORDERED AND DECIDED: There are deficiencies in petitioners' income tax for the taxable years 1964, 1965, and 1966 in the amounts of $2,297.61, $4,803.16, and $5,837.99, respectively.

ENTERED JUL 15 1970

(s) C. MOXLEY FEATHERSTON
Judge.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 7771

NICHOLAS PICCHIONE et al.,

PETITIONERS, APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT, APPELLEE.

ON APPEAL FROM THE TAX COURT OF THE UNITED STATES

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

James R. McGowan, with whom *Lester H. Salter, Harold C. Arcaro, Jr., Alan L. Swartz,* and *Salter, McGowan, Arcaro & Swartz* were on brief, for appellants.

Issie L. Jenkins, Attorney, Tax Division, Department of Justice, with whom *Johnnie M. Walters,* Assistant Attorney General, *Meyer Rothwacks,* and *Grant W. Wiprud,* Attorneys, Tax Division, Department of Justice, were on brief, for appellee.

March 12, 1971

ALDRICH, *Chief Judge.* This is an appeal by a husband and wife from a decision of the Tax Court, 54 T.C. 1490. For simplicity we eliminate some of the background facts, and omit further mention of the wife.

Sometime before 1945 taxpayer devised a new bookkeeping record called the Dome Simplified Weekly Record Book. In 1946 the book was copyrighted and sold to a corporation owned by him in return for monthly payments equal to 20% of the gross selling price of all books sold until October 1, 1973. In 1952 the right to future payments was transferred to a trust. The trustee was directed to accu-

mulate income for a time and then pay the net income of the trust to taxpayer for life. The first payment was made in 1964. Taxpayer is on a cash basis.

In its fiduciary returns for 1964, 1965, and 1966, the trust reported its receipts from the sale of the copyright as long term capital gains, and claimed a deduction for the sums paid to taxpayer. Taxpayer took the same approach. The Commissioner concluded that the payments were, instead, ordinary income, and determined deficiencies for the three years. The Tax Court upheld the Commissioner, and this appeal followed.

In 1946, when the interest in the record book was sold, the revenue code contained no special provisions dealing with copyrights in its definition of capital assets. Copyrights such as the one involved here were considered capital assets so long as they were not held for sale to customers in the ordinary course of trade or business. As a result taxpayers who, like the one at bar, were not engaged in the business of producing copyrighted materials, were entitled to have the profits from the sale of their creations taxed at long term capital gains rates, provided they had held the creations for the required period of time before selling. This favorable treatment was brought to an end by the Revenue Act of 1950, which amended the definition of capital assets to exclude copyrights under the general circumstances presented in this case. The new definition was carried forward, and now appears in section 1221 of the Internal Revenue Code of 1954[1].

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[1] Section 1221 provides in part as follows:

"For purposes of this subtitle, the term 'capital asset' means property held by the taxpayer . . . , but does not include —

. . . .

"(3) a copyright, a literary, musical, or artistic composition, or similar property, held by —

"(A) a taxpayer whose personal efforts created such property, or

"(B) a taxpayer in whose hands the basis of

The 1950 act contained the following provision concerning the effective date of the amendment.

> "The amendments made by this section shall be applicable with respect to taxable years beginning after the date of the enactment of this Act." Revenue Act of 1950, § 210(c), 64 Stat. 933.

Similar language governs the effective date of section 1221 of the 1954 code. Int. Rev. Code of 1954, § 7851(a). The Commissioner takes the position, which the Tax Court affirmed, that under these provisions the new definition is to be used in determining the character of all payments received in taxable years beginning after the enactment of the amendment. Taxpayer, on the other hand, contends that the amended definition applies only to copyrights transferred after the effective date. He points to the word "held," characterizing it as the operative word of the definition, and argues that it means owned and that therefore the amendment does not apply to his copyright because it was not owned by him in a taxable year beginning after the amendment's enactment.

Although the language of the effective date provision will probably bear both meanings the parties advance, the Commissioner's interpretation seems to us to be the proper one. Apart from the fact that literal meaning need not always be given to words in a statute, and congressional concern may be directed to substance rather than niceties of title, section 117(a) of the 1939 code, which contained the definition of capital assets, was not an operative section. It merely supplied definitions to be used in applying section 117(c), which authorized an alternative tax for that part of a taxpayer's income that was net long

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such property is determined, for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property . . . ."

term capital gain in any taxable year. The same relationship now exists between sections 1221 and 1201 of the 1954 code. A determination must be made in each taxable year as to the extent to which income may be taxed at the alternative rate. We are satisfied that Congress' provision for application of the new definition to taxable years beginning after enactment of the 1950 amendment is best understood as meaning that it is to be applied in making that determination for taxable years beginning after that date regardless of the year in which the transfer giving rise to the income occurred.

Any ambiguity that may be though to exist is resolved by examination of the legislative history of the 1950 act. The report of the Senate Finance Committee contains the following explanation of the effect of the amendment on installment sales made prior to its effective date.

> "In the case of the sale, prior to the effective date of the amendment, of an artistic work by a creator who has elected the installment basis under section 44, the tax treatment of installment payments received after such effective date will be governed by the rule of *Snell* v. *Commissioner* (97 Fed. (2d) 891)." S.Rep. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 483, 544.

The same language is contained in a House report. H.R. Rep. No. 2319, 81st Cong., 2d Sess., 1950-2 C.B. 380, 447. *Snell* v. *Commissioner,* 5 Cir., 1938, 97 F.2d 891, holds that in the case of installment sales the law in effect at the time the payment is received, not at the time of the sale, determines the character of the income. The general intention of Congress with respect to receipts from the sale of copyrights sold prior to the passage of the amendment thus seems apparent. *Stern* v. *United States,* E.D.La., 1958, 164 F.Supp. 847, 851-53, *aff'd per curiam,* 262 F.2d 597, *cert. denied* 359 U.S. 969. Taxpayer's attempts to distinguish *Snell* on the ground that it was wrongly decided, or because

of incidental differences with the present case are beside the mark. We are not considering whether the *Snell* decision governs the case at bar, but are looking to it only to verify our conclusion as to Congress' intent.[2]

We remark, in passing, that we are not persuaded of the relevancy of taxpayer's references to certain cases where the Court said that retrospective application of tax laws should be made only when there is a clear congressional mandate. *See, e.g., Claridge Apartments Co.* v. *Commissioner,* 1944, 323 U.S. 141, 164; *Brewster* v. *Gage,* 1930, 280 U.S. 327, 337. Taxpayer's cases involve the application of statutes to income received in years prior to their enactment. Here we are considering only the taxation of income received subsequent to the adoption of the statute, a far less drastic imposition. By the same token we are not persuaded that the Tax Court's interpretation of the statute makes it unconstitutional. Retrospective taxation, even to the extent of applying a statute to impose new tax burdens on taxable events that occurred prior to the enactment of the statute, is not necessarily unconstitutional. *United States* v. *Hudson,* 1937, 299 U.S. 498; *Brushaber* v. *Union Pac. R.R.,* 1916, 240 U.S. 1. To be unconstitutional, the result must be so harsh and oppressive as to amount to a denial of due process. *Welch* v. *Henry,* 1938, 305 U.S. 134,

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[2] The court's language in *Snell* dealing with this matter is short and in our opinion abundantly clear. We quote it in its entirety.

> "As to the instalment sales made in 1923, the taxpayer might have elected to take his whole profit then and have had it taxed under the Revenue Act of 1921. He chose to defer realization of the profits on the deferred instalments. These thereby were left to fall under such provisions of the law as might be of force at their maturity. That the law might be changed, not only in the tax rate but in any other of its provisions, was a risk the taxpayer took in deferring the realization of his gains. The Board rightly applied to them the law as it stood when the gains became taxable." 97 F.2d at 893.

147. In *Welch* the Court upheld the application of a 1935 change in state income tax rates to income earned and reported in 1933.

No constitutional question is even raised by changing the definition of capital assets, and hence the tax rate, applicable to subsequent receipts. Taxpayer has no constitutional right to have all income flowing from his 1946 sale of the copyright taxed under the revenue laws in effect at that time regardless of when the income is received. Tax liability is not a contract. *Welch* v. *Henry,* ante, at 146. Nor has the government ever represented that future years would not bring changes in the tax laws. Such changes are as inevitable as taxation itself. When a taxpayer chooses to spread the realization of income from a transaction over a number of years, as taxpayer did here, the government does not violate due process by taxing that income under the revenue laws in effect in the year in which it is received and reported.

Affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NICHOLAS PICCHIONE ET AL.,
PETITIONERS, APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT, APPELLEE.

JUDGMENT
Entered March 12, 1971

This cause came on to be heard on appeal from the Tax Court of the United States, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The decision of the Tax Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc. Mr. McGowan and Mrs. Jenkins.]

APPENDIX E

U.S. CONST. AMEND. V (1 U.S.C.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTERNAL REVENUE CODE OF 1939 (26 U.S.C.)

Section 117 (a), IRC of 1939 [before amendment by Section 210 (a), Revenue Act of 1950, 64 Stat. 906, 932, 933].

"Section 117. CAPITAL GAINS AND LOSSES.

(a) DEFINITIONS. — As used in this chapter—

(1) CAPITAL ASSETS. — The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1) or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not

exceeding one year from the date of issue, or real property used in the trade, or business of the taxpayer;....."

Section 117 (a), IRC of 1939 [after amendment by Section 210 (a), Revenue Act of 1950, 64 Stat. 906, 932, 933]:

"Section 117. CAPITAL GAINS AND LOSSES.

(a) DEFINITIONS. — As used in this chapter—

(1) CAPITAL ASSETS. — The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1) or real property used in his trade or business;

(C) a copyright; a literary, musical, or artistic composition; or similar property; held by—

(i) a taxpayer whose personal efforts created such property, or

(ii) a taxpayer in whose hands the basis of such property is determined for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property; or

(D) an obligation of the United States or any of its possessions, or of a State or Territory, or

any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue."

Section 210 (c), Revenue Act of 1950 [64 Stat. 933].

"The amendments made by this section shall be applicable with respect to taxable years beginning after the date of the enactment of this Act."

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.)

SEC. 652. INCLUSION OF AMOUNTS IN GROSS INCOME OF BENEFICIARIES OF TRUSTS DISTRIBUTING CURRENT INCOME ONLY.

* * * *

(b) *Character of Amounts.*—The amounts specified in subsection (a) shall have the same character in the hands of the beneficiary as in the hands of the trust.

* * *

* * *

SEC. 662. INCLUSION OF AMOUNTS IN GROSS INCOME OF BENEFICIARIES OF ESTATES AND TRUSTS ACCUMULATING INCOME OR DISTRIBUTING CORPUS.

* * * *

(b) *Character of Amounts.*—The amounts determined under subsection (a) shall have the same character in the hands of the beneficiary as in the hands of the estate or trust.* * *

* * *

SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

* * *

(3) a copyright, a literary, musical, or artistic composition, or similar property, held by—

(A) a taxpayer whose personal efforts created such property, or

(B) a taxpayer in whose hands the basis of such property is determined, for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property;

* * *

SEC. 7851(a). APPLICABILITY OF REVENUE LAWS.

(a) GENERAL RULES. Except as otherwise provided in any section of this title

(1) Subtitle A—

(A) Chapters 1, 2, 4, and 6 of this title shall apply only with respect to taxable years beginning after December 31, 1953....